NO. 82951-9

THE SUPREME COURT
STATE OF WASHINGTON

STATE OF WASHINGTON, PETITIONER,

v.

JOSHUA DEAN SCOTT, RESPONDENT

Court of Appeals Cause No. 34686-9
Appeal from the Superior Court of Pierce County
The Honorable Marywave VanDeren

No. 00-1-04425-1

PETITION FOR REVIEW

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Table of Contents

Table of Authorities

State Cases

Federal and Other Jurisdictions

Statutes

Rules and Regulations

A. IDENTITY OF PETITIONER.

The State of Washington, Respondent below, asks this court to accept review of the Court of Appeals decision terminating review designated in Part B.

B. COURT OF APPEALS DECISION.

The State seeks review of the published opinion, filed on March 10, 2009, in ***In the Matter of Personal Restraint of Joshua Dean Scott***, in COA No. 34686-9-II. *See* Appendix A. The State respectfully requests the Supreme Court review the Court of Appeals decision giving petitioner ***Blakely*** relief when he is not entitled to relief under the decision of this court in ***State v. Evans***, 154 Wn.2d 438, 114 P.3d 627 (2005). The decision below also conflicts with the decision of this Court in ***In re PRP of Breedlove***, 138 Wn.2d 298, 979 P.2d 417 (1999), and ***In Re Mercer***, 108 Wn.2d 714, 741 P.2d 559 (1987).

C. ISSUE PRESENTED FOR REVIEW.

1. Did the Court of Appeals err in granting petitioner relief for ***Blakely*** error when this gives ***Blakely*** retroactive application and conflicts with this Court's holding in ***State v. Evans***?

2. Did the Court of Appeals err in finding that petitioner's judgment was invalid on its face for failure of the trial court to

make a written finding that the firearm enhancements were applicable to petitioner's case when this Court's decision in ***In re Breedlove*** indicates that the proper remedy for such a failure is remand for entry of findings?

3. Did the Court of Appeals ignore well settled jurisprudence from this Court on the burden of proof a petitioner faces in a collateral attacks to prove actual prejudice when all the information before the court below showed that any ***Blakely*** error in petitioner's case was harmless, and petitioner offered no evidence to the contrary?

D. STATEMENT OF THE CASE.

Petitioner, Joshua Scott, was convicted following a jury trial of two counts of robbery in the first degree, one count of unlawful possession of a firearm in the first degree, and one count of possessing stolen property in the first degree. He was also convicted of two counts of possession of a stolen firearm, but these convictions were reversed on appellate review for insufficient evidence that petitioner knew the firearms were stolen. *See* Unpublished Opinion of the Court of Appeals in ***State v. James-Anderson and Scott***, Case No 27270-9-II (consolidated), Appendix E to the State's Supplemental brief. The facts set forth in the opinion on direct appeal

reveal that petitioner entered a jewelry store carrying a rifle and wearing a ski mask; he and his co-defendant threatened to kill the two store employees, before tying them up and taking money, gold, diamonds, and guns from the store, as well as personal property from one of the employees. *Id.*

The State had alleged firearm enhancements on the two robberies (Counts I and II), and possession of stolen property (Count V). Amended Information, *see* Appendix 1 to the Personal Restraint Petition. The jury was given special verdict forms and instructed:

> For the purposes of a special verdict the State must prove beyond a reasonable doubt that the defendant was armed with a deadly weapon at the time of the commission of the crime of robbery in the first degree as charged in Counts I and II and possession of stolen property in the first degree as charge in Count V.
>
> ***A pistol, revolver, or any other firearm is a deadly weapon whether loaded or unloaded.***
>
> If one participant to a crime is armed with a deadly weapon, all accomplices who know the participant is armed are deemed to be so armed, even if only one deadly weapon is involved.

See Instruction 49 (emphasis added), Court's Instructions to the Jury, Appendix D to the State's Response. Other instructions defined a "deadly weapon" as "any firearm, whether loaded or not" and "firearm" as being "a weapon or device from which a projectile may be fired by an explosive

such as gunpowder." Instruction Nos. 22 and 30, Court's Instructions to the Jury, *see* Appendix D to the State's Response. Under these instructions, the jury was informed that the term "deadly weapon" referred only to various types of firearms. The special verdict forms asked the jury to determine whether the petitioner was "armed with a deadly weapon at the time of the commission of the crime" charge in Counts I, II and V. Appendix C to the State's Response. The jury answered "yes" on each of these special verdicts. *Id.*

On direct appeal from his conviction, petitioner challenged the sufficiency of the information in alleging the firearm enhancement pertaining to the possession of the stolen property (Count V). The Court of Appeals found that the language used in the amended information was sufficient to put petitioner on notice that the State was seeking an enhancement based upon him being armed with a firearm. *See* Unpublished Opinion of the Court of Appeals in ***State v. James-Anderson and Scott***, Case No 27270-9-II (consolidated), Appendix E to the State's Supplemental Brief. On direct appeal, the Court of Appeals remanded petitioner's case for re-sentencing without the two reversed convictions. *Id.*

On remand to the superior court, the court re-sentenced petitioner on two counts of robbery, a count of unlawful possession of a firearm, and

one count of possessing stolen property in the first degree. Judgment and Sentence, *see* Appendix A to the State's Response. The court imposed additional confinement for firearm enhancements as opposed to deadly weapon enhancements. *Id.* Petitioner did not appeal from entry of this judgment, which was entered on April 9, 2004. Thus, petitioner's case became final for the purposes of retroactivity analysis, on May 10, 2004.

Almost two years later, on April 11, 2006, petitioner filed a personal restraint petition with Division II of the Court of Appeals. Petitioner asserted that under the decision in ***State v. Recuenco***, 154 Wn. 2d 156, 110 P.3d 188 (2005), he was entitled to have his firearm enhancements vacated and be sentenced under the provisions for deadly weapon enhancements. The petition was stayed pending decision of the United States Supreme Court in ***Washington v. Recuenco***, and was again stayed for a decision by the Washington Supreme Court on the ***Recuenco*** case on remand from the United States Supreme Court, after which the Court of Appeals asked for supplemental briefing.

On March 10, 2009, the Court of Appeals issued a published opinion, signed by three judges; the court granted the petition and ordered that the matter be remanded for re-sentencing; the court directed the trial court to enter deadly weapon enhancements as opposed to firearm enhancements. Appendix A.

The State now seeks review of this decision.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED.

1. THE COURT OF APPEALS ERRONEOUSLY GRANTED PETITIONER ***BLAKELY*** RELIEF WHEN HE WAS NOT ENTITLED TO RETROACTIVE APPLICATION OF THAT DECISION ON COLLATERAL REVIEW.

On June 24, 2004, the United States Supreme Court issued ***Blakely v. Washington***, 542 U.S. 296, 124 S. Ct. 2531, 159 L.Ed.2d 403 (2004), which stated that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 542 U.S. at 301 (citing ***Apprendi v. New Jersey***, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L.Ed.2d 435 (2000)). While ***Blakely*** represented a sea change in sentencing law, this Court has determined that it does not apply retroactively to cases that were final when ***Blakely*** was announced. ***State v. Evans***, 154 Wn.2d 438, 448, 114 P.3d 627, *cert. denied*, 126 S. Ct. 560, 163 L.Ed.2d 472 (2005); ***State v. Hagar***, 158 Wn.2d 369, 144 P.3d 298 (2006). "A state conviction and sentence becomes final for purposes of retroactivity analysis when the availability of direct appeal to the state courts has been exhausted and the time for filing a petition for a writ of certiorari has elapsed or a timely filed petition has been finally denied." ***Caspari v. Bohlen***, 510 U.S. 383, 390, 114 S. Ct. 948, 127 L.Ed.2d 236 (1994), citing ***Griffith v. Kentucky***, 479 U.S.

314, 321, n.6, 107 S. Ct. 708, 93 L.Ed.2d 649 (1987). Washington has adopted this standard. ***In re Pers. Restraint of St. Pierre***, 118 Wn.2d 321, 327, 823 P.2d 492 (1992) (quoting ***Griffith v. Kentucky***, 479 U.S. at 321 n.6)).

Following the decision in ***Blakely***, this court, in a case on *direct* review, addressed whether ***Blakely*** error was subject to harmless error analysis; the court held that it was not. ***State v. Recuenco***, 154 Wn. 2d 156, 110 P.3d 188 (2005)("***Recuenco I***") (holding a trial court could not impose time for firearm enhancements when the jury had returned a verdict for deadly weapon enhancement despite the fact that the only evidence was that defendant was armed with a firearm). The United States Supreme Court took review of this decision and reversed, finding that ***Blakely*** error was subject to harmless error analysis. ***Washington v. Recuenco***, 548 U.S. 212, 126 S. Ct. 2546, 165 L.Ed.2d 466 (2006)(***"Recuenco II"***). On remand from the United States Supreme Court, the Washington Supreme Court abandoned its prior focus on the ***Blakely*** error, and held that firearm enhancements could not be imposed because they had not been properly alleged in the information. ***State v. Recuenco***, 163 Wn.2d 428, 180 P.3d 1276 (2008)("***Recuenco III***"). All three ***Recuenco*** decisions were part of Recuenco's direct review of his convictions. Nothing in any of the ***Recuenco*** cases undermined the holding in ***Evans*** where this court determined that ***Blakely*** applies only to convictions or direct appeals that were not final at the time ***Blakely*** was

announced. Thus, the law remains in Washington that ***Blakely*** cannot be applied retroactively on collateral review. ***State v. Evans***, 154 Wn.2d 438, 449, 457, 114 P.3d 627 (2005).

In the case now before the court, it is beyond question that petitioner's case was final before the ***Blakely*** decision issued. After his direct appeal, he was re-sentenced without the two reversed convictions; that judgment was filed on April 9, 2004. Direct review of this sentence was available for thirty days or until May 10, 2004. Petitioner did not appeal from his re-sentencing so his case was "final" for the purposes of retroactivity analysis when the decision issued in ***Blakely*** on June 24, 2004.

When petitioner filed his petition on April 11, 2006, he asked for relief under ***Recuenco I***. That decision, however, addressed ***Blakely*** error in a case on *direct review*. Petitioner was not, and is not, in the same procedural posture as Mr. Recuenco. As petitioner's case was final at the time ***Blakely*** issued, he was not entitled to relief from ***Blakely*** error under either ***Blakely*** or ***Recuenco I***. The Court of Appeals should have dismissed his petition as meritless, as petitioner was seeking relief to which he was not entitled. The opinion below is confusing as it acknowledges that petitioner is not entitled to relief under ***Blakely*** as his case was final at the time that decision issued, *see* Appendix A, Opinion at p.7, n.4, but nevertheless grants petitioner ***Blakely*** relief by directing re-

sentencing on deadly weapon enhancements as opposed to firearm enhancements. The decision below conflicts with this Court's decision in ***State v. Evans***, holding ***Blakely*** relief is not available on collateral review. This provides a basis for review under RAP 13.4(b)(1).

It would appear that the Court of Appeals wrongly focused on whether it could grant relief under the provisions of RCW 10.73.090 and 10 .73.100, as it spent considerable time discussing these provisions in the opinion. When petitioner seeks relief for ***Blakely*** error, the timeliness of his petition for collateral relief is, generally, irrelevant. ***Blakely*** relief is not available in any case where the availability for direct review was over at the time that decision issued. This determination of finality for retroactivity analysis is a distinct determination from whether a particular defendant might still be timely in filing a collateral attack. When faced with a petitioner seeking retroactive application of the ***Blakely*** decision, it does not matter whether his petition is timely or not – he is not entitled to relief. Because the Court of Appeals gave retroactive application to ***Blakely*** on collateral review, its decision is in conflict with this court's decision in ***Evans***. This court should grant review.

2. THE COURT OF APPEALS ERRONEOUSLY FOUND THE JUDGMENT TO BE FACIALLY INVALID AND CHOSE THE WRONG REMEDY FOR ANY FAILURE TO ENTER NECESSARY FINDINGS.

Although the State's primary argument is that petitioner was not entitled to retroactive application of the ***Blakely*** decision, the decision below is also erroneous because it finds that petitioner's judgment and sentence is facially invalid and applies the wrong remedy for failure to enter findings of fact and conclusions of law.

This Court addressed what makes a judgment facially invalid under RCW 10.73.090:

> Under this statute, the "facial invalidity" inquiry is directed to the judgment and sentence itself. "Invalid on its face" means the judgment and sentence evidences the invalidity without further elaboration.

In re Personal Restraint of Hemenway, 147 Wn.2d 529, 532, 55 P.3d 615 (2002); *see also* ***In re Personal Restraint Petition of Goodwin***, 146 Wn.2d 861, 50 P.3d 618 (2002) (court could properly consider petitioner's challenge to offender score (miscalculated upward) because judgment listed washed out juvenile convictions which had been used in the calculation of the offender score, thereby rendering the judgment "facially invalid"). In deciding whether a judgment and sentence arising from a guilty plea is valid "on its face," this Court has considered documents

signed as part of the plea agreement or incorporated into the plea agreement or judgment and sentence itself. ***In re Personal Restraint of Thompson***, 141 Wn.2d 712, 718, 10 P.3d 380 (2000). Plea documents are "relevant only where they may disclose invalidity in the judgment and sentence." ***Hemenway***, 147 Wn.2d at 533, 55 P.3d 615.

The Court of Appeals found that RCW 10.73.090 did not bar petitioner's collateral attack because his judgment was invalid on its face stating it "evidences, without further elaboration, that firearm enhancements were imposed on deadly weapon special verdicts." Opinion below at p. 6, Appendix A. Later in the opinion, the Court of Appeals reiterates the fault it finds with the judgment is that "misrepresents the jury's special verdict" and therefore is facially invalid. The decision below also acknowledges that under the controlling law at the time of sentencing , a trial court was required to impose the time associated with firearm enhancements –despite a jury special verdict finding defendant used a deadly weapon- if all of the evidence at trial showed the weapon was a firearm. *See* Appendix A, Opinion below citing ***State v. Meggyyesy***, 90 Wn. App. 693, 958 P.2d 319 (1998), ***State v Rai***, 97 Wn. App. 307, 983 P.2d 712 (1999), and ***State v. Olney***, 97 Wn. App. 913, 987 P.2d 662 (1999).

A review of petitioner's judgment reveals that paragraph 2.1 indicates that petitioner was "found guilty on 02/05/01 by [ ] plea [X] jury-verdict [ ] bench trial" of four crimes "as charged in the Amended Information[.]" The judgment immediately goes on to indicate:

> [X] A special verdict/finding for use of a firearm was returned on Counts I, II, V

See Judgment and Sentence, Appendix A to the State's Response. Contrary to the impression created in the opinion below, none of these notations were handwritten or interlineated by the sentencing judge; these findings were indicated by typed "X's" adopting standard language on the judgment form. *Id.* The sentencing court imposed additional confinement of 60 months on each of the robberies, and 36 months on the possession of stolen property count; this time is consistent with firearm enhancements rather than deadly weapon enhancements. *Id.*

In the decision below, the Court of Appeals seems to find fault with the sentencing court's failure to enter a written finding on the judgment that it was finding the firearm enhancement was applicable, as opposed to the jury's finding of a deadly weapon enhancement.

Firstly, the part of the judgment set forth above that indicates a "...finding for use of a firearm was returned on Counts I, II, V" could be construed as a written notation of the sentencing court's finding that the

firearm enhancement should be applied. The sentence is in the passive voice and does not indicate what "entity" has returned a finding; it could be construed as being either the court or the jury. In collateral attacks, inferences, if any are made, are to be drawn in favor of the validity of the judgment and sentence and not against it. ***In re Hagler***, 97 Wn.2d 818, 825-26, 650 P.2d 1103 (1982). Had the Court of Appeals properly been applying this principle of law, it would have found that the judgment contained the necessary finding.

Secondly, this Court has never held that failure to make such a written finding renders the judgment and sentence invalid. In ***In re Personal Restraint of Breedlove***, 138 Wn.2d 298, 311, 979 P.2d 417 (1999), this court was faced with a collateral attack where the petitioner tried to vacate his exceptional sentence by arguing that his exceptional sentence - based solely on the stipulation of the parties -was not statutorily authorized and was unsupported by entry of required findings of fact and conclusions of law. This Court ultimately rejected both of Breedlove's arguments but did remand for entry of findings and conclusions. This Court noted the remedy for a trial court's failure to enter findings necessary to support its sentence:

> The remedy for a trial court's failure to issue findings of fact and conclusions of law is ordinarily remand for entry of the findings, and we remand here for that purpose. The failure to enter findings does not justify vacation of the sentence in a personal restraint proceeding unless it is a fundamental defect which results in a complete miscarriage of justice.

In re Personal Restraint of Breedlove, 138 Wn.2d 298, 311, 979 P.2d 417 (1999). Nothing in ***Breedlove*** indicates that the failure to enter necessary findings on a sentencing issue renders a judgment facially invalid. It does hold that remand for entry of findings is the proper remedy for failure to enter necessary findings and not remand for re-sentencing. The decision below conflicts with this Court's decision in ***Breedlove***. This provides another basis for review under RAP 13.4(b)(1).

3. THE COURT BELOW FAILED TO HOLD PETITIONER TO HIS BURDEN OF SHOWING ACTUAL PREJUDICE AND GRANTED RELIEF WHERE THE ***BLAKELY*** ERROR WAS HARMLESS.

Although the State's primary argument is that petitioner was not entitled to retroactive application of the ***Blakely*** decision, the decision below is also erroneous because it grants petitioner relief without requiring him to show that he was actually prejudiced by the error that occurred.

In a collateral action, the petitioner has the duty of showing constitutional error and that such error was actually prejudicial. The rule that constitutional errors must be shown to be harmless beyond a reasonable doubt has no application in the context of personal restraint petitions. ***In re Mercer***, 108 Wn.2d 714, 718- 21, 741 P.2d 559 (1987); ***In re Hagler***, 97 Wn.2d 818, 825, 650 P.2d 1103 (1982). Before a personal restraint petition may be granted, the petitioner must prove that the constitutional errors "worked to his or her actual and substantial prejudice." ***Mercer***, 108 Wn.2d at 721. Mere assertions are insufficient in a collateral action to demonstrate actual prejudice. Inferences, if any, must be drawn in favor of the validity of the judgment and sentence and not against it. ***Hagler***, 97 Wn.2d at 825-26.

In neither his initial petition nor his supplemental briefing, does petitioner provide any supporting evidence to show that the jury heard any testimony to indicate that petitioner was armed with anything other than a firearm during the commission of his crimes. Petitioner does not address the facts of his case at all in his pleadings. The facts set forth in the opinion on direct review, information that was before the Court of Appeals, indicates that petitioner was armed with a rifle when he entered the jewelry store to commit the robberies. Unpublished Opinion of the Court of Appeals in ***State v. James-Anderson and Scott***, Case No 27270-

9-II (consolidated), Appendix E to the State's Supplemental brief. Petitioner was seen leaving the store -still in possession of the rifle- by a detective who had responded to the dispatch about a robbery in progress. *Id.* There is nothing in the opinion on direct review to indicate that petitioner was armed with a deadly weapon other than a firearm.

Petitioner did not provide any supporting evidence to show that there was conflicting evidence before the jury that might support a showing of actual prejudice. *See* ***Neder v. United States***, 527 U.S. 1, 18, 119 S. Ct. 1827, 144 L.Ed.2d 35 (1999)("We believe that where an omitted element is supported by uncontroverted evidence, this [harmless error] approach reaches an appropriate balance between society's interest in punishing the guilty [and] the method by which decisions of guilt are to be made." (internal quotations omitted)) The court below did not properly hold petition to his burden of showing actual prejudice as required by ***Mercer***.

Moreover, the instructions given to the jury in this case essentially required it to find that petitioner was armed with a firearm in order to answer "yes" to the special verdict. The jury was given special verdict forms and instructed:

> For the purposes of a special verdict the State must prove beyond a reasonable doubt that the defendant was armed with a deadly weapon at the time of the commission of the crime of robbery in the first degree as charged in Counts I and II and possession of stolen property in the first degree as charge in Count V.
>
> ***A pistol, revolver, or any other firearm is a deadly weapon whether loaded or unloaded.***
>
> If one participant to a crime is armed with a deadly weapon, all accomplices who know the participant is armed are deemed to be so armed, even if only one deadly weapon is involved.

Instruction 49 (emphasis added), *see* Court's Instructions to the Jury, Appendix D to the State's Response. Other instructions defined a "deadly weapon" as "any firearm, whether loaded or not" and "firearm" as being "a weapon or device from which a projectile may be fired by an explosive such as gunpowder." Instruction Nos. 22 and 30, *see* Court's Instructions to the Jury, Appendix D to the State's Response. Under these instructions, the jury was informed that the term "deadly weapon" referred only to various types of firearms. Although the special verdict forms asked the jury to determine whether the petitioner was "armed with a deadly weapon at the time of the commission of the crime" charged in Counts I, II and V, for the jury to answer this question in the affirmative, it had to find that petitioner was armed with a firearm. Special Verdicts, *see* Appendix C to

the State's Response. The jury answered "yes" on each of these special verdicts finding petitioner was armed with a "deadly weapon," but under the instructions a "deadly weapon" was defined as a "firearm" and nothing else. *Id.* The jury also found petitioner guilty of unlawful possession of a firearm in Count IV. Jury Verdicts, *see*, Appendix B to the State's Response. Under these facts and instructions, any deficiency in the wording of the special verdict was harmless. The Court of Appeals failed to hold the petitioner to his burden of proving actual prejudice and granted relief when the error was clearly harmless. Because the decision below conflicts with this Court's jurisprudence on the burden of petitioner to prove that he is entitled to relief, this court should grant review under RAP 13.4(b)(1).

F. CONCLUSION.

For the foregoing reasons, this court should grant the State's petition for review.

DATED: April 9, 2009.

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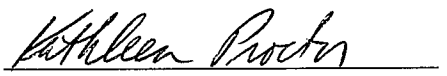

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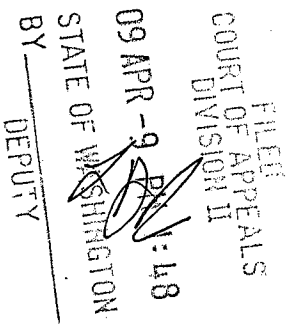
Certificate of Service:
The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

4-9-09 Theresa Kern
Date Signature



APPENDIX "A"

Published Opinion

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

In the Matter of Personal Restraint of JOSHUA DEAN SCOTT, Petitioner.	No. 34686-9-II PUBLISHED OPINION

QUINN-BRINTNALL, J. — Joshua D. Scott seeks relief from personal restraint after the sentencing court imposed two 60-month consecutive firearm enhancements on two counts of first degree robbery and one 36-month firearm enhancement on one count of first degree possession of stolen property. In the amended information, the State notified Scott of its intention to invoke the firearm sentence enhancement provisions of former RCW 9.94A.310 (1999). But it submitted deadly weapon special verdict forms to the jury rather than firearm enhancement special verdict forms. The jury returned the special verdict forms, finding that Scott was armed with a deadly weapon during the commission of the charged offenses. When Scott was sentenced, the law allowed the judge, rather than the jury, to enter a finding that the deadly weapon at issue was a firearm, but the sentencing court did not do so. Accordingly, the record does not support the firearm enhancement provisions of Scott's judgment and the sentence enhancement portion of Scott's judgment and sentence is invalid on its face. We grant the

petition and remand with directions to correct Scott's judgment and sentence by imposing deadly weapon enhancements in place of the firearm enhancements.

FACTS

On September 16, 2000, Scott and Douglas James-Anderson parked a stolen Chevrolet Blazer in front of Cascade Custom Jewelers, entered the store, threatened to kill two employees with a rifle, and tied the employees' hands behind their backs.[1] Scott and James-Anderson stole about $80,000 worth of goods, including jewelry, diamonds, cash, three guns, and a wallet from a store employee's pocket. The police arrested Scott and James-Anderson shortly after they left the jewelry store, recovering two rifles and four pistols from the Blazer. Scott confessed.

The State charged Scott by amended information with two counts of first degree robbery (counts I and II), first degree unlawful possession of a firearm (count IV), first degree possession of stolen property (count V), two counts of possession of a stolen firearm (counts VI and VII), and two counts of firearm theft (counts VIII and IX). As relevant here, the amended information included the following sentencing enhancements for first degree robbery (counts I and II):

> [T]he defendant or an accomplice was armed with a deadly weapon or displayed what appeared to be a firearm or other deadly weapon, to-wit: a rifle, that being a firearm as defined in [former] RCW 9.41.010 [1997], and invoking the provisions of [former] RCW 9.94A.310 and adding additional time to the presumptive sentence as provided in [former] RCW 9.94A.370 [1999].

Suppl. Br. of Resp't, App. B. The information for count V also charged that Scott possessed

> stolen property other than a firearm, to-wit: a 1990 Chevrolet Blazer, of a value in excess of $1,500.00, belonging to Esperanza Mattos, with intent to appropriate

[1] Unless otherwise noted, all facts are taken from the opinion in Scott's direct appeal, *State v. James-Anderson and Scott*, noted at 116 Wn. App. 1053 (2003). Additionally, there are no Clerk's Papers for PRPs, so all citations to documents are to the attachments to the parties' briefs.

> said property to the use of any person other than the true owner or person entitled thereto, that being a firearm as defined in [former] RCW 9.41.010, and invoking the provisions of [former] RCW 9.94A.310 and adding additional time to the presumptive sentence as provided in [former] RCW 9.94A.370.

Suppl. Br. of Resp't, App. B.

The trial court instructed the jury on deadly weapon sentencing enhancements, but it did not instruct the jury on firearm enhancements.

The jury entered guilty verdicts on counts I, II, IV, V, VI, and VII and not guilty verdicts on counts VIII and IX. The jury also returned special verdicts for the sentencing enhancements, finding that Scott was "armed with a deadly weapon" when he committed first degree robbery (counts I and II) and first degree possession of stolen property (count V).

The sentencing court wrote on Scott's judgment and sentence, "as charged in the Amended Information[, a] special verdict/finding for use of *firearm* was returned on Count(s) I, II, V RCW 9.94A.602, .510." Suppl. Br. of Resp't, App. A (emphasis added). The sentencing court imposed two 60-month firearm sentencing enhancements on counts I and II and a 36-month firearm enhancement on count V, each to run consecutively.

Scott filed a direct appeal with this court, arguing in part that count V of the amended information did not give him adequate notice of a firearm enhancement because it omitted the critical words "and in the commission thereof the defendant was armed with a firearm, to wit: a rifle." *James-Anderson*, 2003 WL 1986423, at *9. We applied the *Kjorsvik*[2] test for post-verdict challenges to the sufficiency of an information and held that the information was sufficient to notify Scott of a firearm enhancement. *James-Anderson*, 2003 WL 1986423, at *10. We also

[2] *State v. Kjorsvik*, 117 Wn.2d 93, 108-09, 812 P.2d 86 (1991).

reversed Scott's convictions for possession of stolen firearms (counts VI and VII) because the evidence was insufficient to support the element that Scott knew the firearms in the Blazer were stolen. *James-Anderson*, 2003 WL 1986423, at *10.

Scott was resentenced on April 9, 2004, and did not appeal that judgment and sentence. He filed this personal restraint petition (PRP) over two years later, on April 11, 2006.

ANALYSIS

PRP STANDARDS

As a threshold matter, we note that a personal restraint petitioner may not renew an issue that was raised and rejected on direct appeal unless the interests of justice require relitigation of that issue. *In re Pers. Restraint of Taylor*, 105 Wn.2d 683, 688, 717 P.2d 755 (1986). On direct appeal, Scott argued that count V of the amended information did not give him adequate notice of a firearm enhancement because it omitted the critical words "and in the commission thereof the defendant was armed with a firearm, to wit: a rifle." *James-Anderson*, 2003 WL 1986423, at *9. We held that the information was sufficient to charge a firearm enhancement. *James-Anderson*, 2003 WL 1986423, at *10. We did not decide the issue before us here, whether the judgment and sentence misstated the jury's verdict. Accordingly, the prior direct appeal which addressed a substantially different issue, does not preclude the relief from the erroneous firearm enhancement on count V requested here. *See In re Taylor*, 105 Wn.2d at 688.

The petitioner may raise new issues, including both errors of constitutional magnitude that result in actual and substantial prejudice and nonconstitutional errors that constitute "a fundamental defect which inherently results in a complete miscarriage of justice." *In re Pers. Restraint of Cook*, 114 Wn.2d 802, 812, 792 P.2d 506 (1990); *In re Pers. Restraint of Mercer*, 108 Wn.2d 714, 721, 741 P.2d 559 (1987); *In re Pers. Restraint of Hews*, 99 Wn.2d 80, 87, 660

P.2d 263 (1983). Regardless of whether the petitioner bases his challenges on constitutional or nonconstitutional error, he must support his petition with facts or evidence on which his claims of unlawful restraint are based and not rely solely on conclusory allegations. *Cook*, 114 Wn.2d at 813-14.

TIMELINESS OF SCOTT'S PRP

We must also determine whether Scott's PRP is timely.

RCW 10.73.090(1) provides:

> No petition or motion for collateral attack on a judgment and sentence in a criminal case may be filed more than one year after the judgment becomes final if the judgment and sentence is valid on its face and was rendered by a court of competent jurisdiction.

A PRP is a collateral attack on a judgment. RCW 10.73.090(2). Scott's judgment and sentence became final on April 9, 2004, when his judgment was filed upon resentencing. *See* RCW 10.73.090(3)(a). Accordingly, when Scott filed the present petition on April 11, 2006, more than one year had elapsed and we cannot review petitioner's claims unless either (1) the time bar does not apply because his judgment and sentence is facially invalid, (2) the judgment and sentence was not rendered by a court of competent jurisdiction, or (3) one or more of the six exceptions to the time bar enumerated in RCW 10.73.100[3] applies. We hold that the time bar does not operate here because Scott's judgment and sentence is facially invalid.

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[3] RCW 10.73.100 provides:

> The time limit specified in RCW 10.73.090 does not apply to a petition or motion that is based solely on one or more of the following grounds:
>
> (1) Newly discovered evidence, if the defendant acted with reasonable diligence in discovering the evidence and filing the petition or motion;
>
> (2) The statute that the defendant was convicted of violating was unconstitutional on its face or as applied to the defendant's conduct;
>
> (3) The conviction was barred by double jeopardy under Amendment V of the United States Constitution or Article I, section 9 of the state Constitution;

Either a constitutional or nonconstitutional error can render a judgment and sentence facially invalid under RCW 10.73.090. *In re Pers. Restraint of Goodwin*, 146 Wn.2d 861, 866, 50 P.3d 618 (2002). A judgment and sentence is facially invalid if it evidences the invalidity without further elaboration. *Goodwin*, 146 Wn.2d at 866. But courts may look at documents other than the judgment and sentence, including charging documents and verdict forms, to determine facial invalidity. *See In re Pers. Restraint of Richey*, 162 Wn.2d 865, 870-72, 175 P.3d 585 (2008); *In re Pers. Restraint of Hemenway*, 147 Wn.2d 529, 532, 55 P.3d 615 (2002).

Here, the jury was instructed on deadly weapon sentencing enhancements and returned special verdicts finding that Scott was "armed with a deadly weapon" when he committed the crimes. Scott's judgment and sentence misstates the jury's special verdict by (1) stating that the jury found that Scott was armed with a firearm (rather than a deadly weapon) when he committed the crimes and (2) imposing firearm enhancements without a jury or judicial finding that Scott was armed with a firearm. Accordingly, RCW 10.73.090 does not bar Scott's petition because the judgment and sentence evidences, without further elaboration, that firearm enhancements were imposed on deadly weapon special verdicts and, thus, the judgment and sentence is facially invalid. *State v. Recuenco*, 163 Wn.2d 428, 439, 180 P.3d 1276 (2008)

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(4) The defendant pled not guilty and the evidence introduced at trial was insufficient to support the conviction;

(5) The sentence imposed was in excess of the court's jurisdiction; or

(6) There has been a significant change in the law, whether substantive or procedural, which is material to the conviction, sentence, or other order entered in a criminal or civil proceeding instituted by the state or local government, and either the legislature has expressly provided that the change in the law is to be applied retroactively, or a court, in interpreting a change in the law that lacks express legislative intent regarding retroactive application, determines that sufficient reasons exist to require retroactive application of the changed legal standard.

(sentencing court commits error by imposing a sentence that the jury's verdict does not authorize).

We note that when Scott was sentenced, case law allowed a trial court to impose a firearm enhancement on a jury's deadly weapon special verdict. *See, e.g.*, *State v. Meggyesy*, 90 Wn. App. 693, 958 P.2d 319, *review denied*, 136 Wn.2d 1028 (1998), *abrogated by State v. Recuenco*, 154 Wn.2d 156, 110 P.3d 188 (2005), *aff'd*, 163 Wn.2d 428; *State v. Rai*, 97 Wn. App. 307, 310-11, 983 P.2d 712 (1999), *abrogated by Recuenco*, 154 Wn.2d 156; *State v. Olney*, 97 Wn. App. 913, 987 P.2d 662 (1999), *abrogated by Recuenco*, 154 Wn.2d 156. In the relevant cases, the trial court, rather than the jury, found that the deadly weapon that the jury had found the defendant used in the crime was in fact a firearm.[4] *Meggyesy*, 90 Wn. App. at 709 ("if the deadly weapon finding is a sentencing factor, the sentencing court may make the required [firearm] finding"); *Rai*, 97 Wn. App. at 311 (upon deadly weapon special verdict, sentencing court judge is *required* to make independent finding regarding whether the weapon was a firearm); *Olney*, 97 Wn. App. at 918-19 (sentencing court is allowed to make factual finding of firearm). But courts have long been required to memorialize their factual findings in a written document. *See* RCW 10.46.070; CR 52(a); *State v. Wilks*, 70 Wn.2d 626, 628-29, 424 P.2d 663 (1967).

[4] Although such judicial fact-finding is now prohibited under *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), and its progeny, that case law does not apply retroactively to cases that were final when *Blakely* was decided. *State v. Evans*, 154 Wn.2d 438, 457, 114 P.3d 627, *cert. denied*, 546 U.S. 983 (2005). Scott's judgment and sentence became final on April 9, 2004, when his judgment was filed upon resentencing. The United States Supreme Court decided *Blakely* on June 24, 2004, two months after Scott's case was final and, therefore, *Blakely* does not apply retroactively to Scott's collateral review. *See Evans*, 154 Wn.2d at 457.

Here, the sentencing court did not enter a finding that the weapon Scott used was a firearm. Instead, the court's notation on the judgment and sentence indicated that it believed the jury had made such a finding. The trial court wrote on Scott's judgment and sentence "as charged in the Amended Information[, a] special verdict/finding for use of firearm was returned on Count(s) I, II, V RCW 9.94A.602, .510." Suppl. Br. of Resp't, App. A. This notation misstates the jury's verdict, in which it found only that Scott was armed with a deadly weapon. Other sections of the judgment and sentence clarify that "the court finds" other facts and that the court, if it found reasons justifying an exceptional sentence, would attach written findings of fact and conclusions of law.

Although on April 9, 2004, the date Scott was resentenced, the sentencing court could have found that Scott was armed with a firearm, it did not do so. Instead, the judgment and sentence misrepresents the jury's special verdict. This error is contrary to the jury's verdict and renders the judgment and sentence facially invalid. *State v. Robinson*, 104 Wn. App. 657, 664, 17 P.3d 653 (holding judgment and sentence valid on its face in light of similar challenge because the judgment and sentence following a guilty plea "states that the court made a finding on the deadly weapon enhancement"), *review denied*, 145 Wn.2d 1002 (2001).

Accordingly, we vacate Scott's judgment and sentence and remand to the trial court with directions that it correct the erroneous firearm enhancements. The resentencing court shall impose the deadly weapon enhancements that the jury's special verdicts authorized and strike the firearm enhancements the trial court erroneously imposed.[5]

[5] On counts I and II, Scott was sentenced to two 60-month firearm enhancements, which should be replaced with two 24-month deadly weapon enhancements. Former RCW 9.94A.310(4)(a). On count V, Scott was sentenced to a 36-month firearm enhancement, which should be replaced with a 12-month deadly weapon enhancement. Former RCW 9.94A.310(4)(b). All deadly

Petition granted.

QUINN-BRINTNALL, J.

We concur:

ARMSTRONG, J.

PENOYAR, A.C.J.

weapon enhancements must run consecutively. Former RCW 9.94A.310(4)(e). Further, the firearm sentencing enhancements were "served in total confinement," meaning that Scott was not eligible for good time while he served them. Former RCW 9.94A.310(3)(e). We leave it to the parties and the Department of Corrections to resolve whether Scott's good time should be reassessed in light of the erroneous sentence. We also note that, because this opinion vacates Scott's prior judgment and sentence, *Blakely* and its progeny apply at resentencing and, therefore, the resentencing court may not employ judicial fact-finding in order to sentence Scott to firearm enhancements. *See Evans*, 154 Wn.2d at 457.